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ABSTRACT

Teacher evaluation procedures, if ineptly accomplished, are potentially vulnerable to litigation (which most school districts can ill afford), because there is no consensus as to what constitutes effective teaching; hence the validity of rating systems and/or reliability of observations is open to challenge. Accordingly, the evaluation policies and procedures in five Utah school districts are analyzed to derive a composite picture of characteristic legally vulnerable flaws: (1) the stated criteria are not clearly tied to the teaching task; (2) the performance criteria are not clearly defined in terms of observable behaviors or explicit standards; (3) there is no training for evaluators, and so there is no guarantee of reliability or consistency in the observation process. Because Utah has no statutes governing teacher evaluation, a series of landmark court decisions are cited that bear on the above issues. These include "Griggs vs. Duke Power Co." (1970), which prohibits non-job-related employment practices; "Chance vs. Board of Examiners" (1972), which requires evaluation criteria to demonstrate both content and predictive validity; and "Brito et al. vs. The Zia Company" (1973), which prohibits ill-defined and subjectively based evaluation criteria. An appendix provides the eight questions used to assess the deficiencies in the evaluation procedures under study. (TE)

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ANALOGIZING TEACHER EVALUATION POLICIES AND PROCEDURES WITH CASE LAW

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Introduction

Today it is generally accepted that we live in a litigious society. Education no less than anyone or any other endeavor is vulnerable to the effects of an adverse court decision. A review of court decisions and the rules of law they have established reveals that school districts often face a myriad of potentially damaging legal situations. Unfortunately, any significant loss in a court battle results in a loss of essential resources that can materially detract from the education of the children.

One current area of educational practice that is subject to discordant controversy and is receiving increased attention in the courts is teacher evaluation. Although the notion of evaluation as a means to increase productivity by eliminating the ineffective or inefficient teachers is laudable and meritorious in its concept, if it is ineptly accomplished it can lead to an undesirable level of vulnerability in the legal arena. The peril implicit in the evaluation process arises from three major sources. First, the responsibility imposed by evaluation often results in two conflicting purposes for the evaluator. On the one hand s/he wears the hat of facilitator and helper, on the other hand s/he becomes a critic or judge. As Salek (1975)[1] points out, this frequently has the potential for engendering or exacerbating conflict between the evaluator/administrator and the teacher. The consequences of such conflict can, and often does become a the basis for litigation. Second, the public demand for accountability in the classroom has focused attention on relationships between teaching behavior and educational outcomes that have yet to be proven. In a summary of the recent literature on the evaluation of principals, teachers and students conducted at Stanford University, Natrell et al.[2] point out that"evaluation is presently [a] confusing and underdeveloped field, with most of the literature not based on empirical research and parochial at best." This lack of common agreement as to what constitutes effective teaching raises serious doubts about the credibility of evaluation practices, and even more important the inept use of this process can place a school district in legal jeopardy. Third, although a desire exists within the teaching profession to improve and develop instructional practices, teachers are demanding that school districts defend the evaluation policies and practices they employ to measure performance and judge their worth.[3] It appears that all too frequently school districts develop and implement teacher evaluation practices with a mechanistic format,[4] giving little consideration to the validity of rating items and/or the reliability of the observations on which the ratings are based. When such practices violate the constitutionally protected rights of the teacher, evaluation policies and practices can become the bases for an unwanted court issue.

Although Zirkel (1978)[5] observes there is surprisingly little litigation that is directly on point, the foregoing issues can serve as a fertile field for court action and the courts do not appear to have hesitated to intervene in procedural conflicts that involve alleged violations of constitutional or statutory rights. Nevertheless, because of opposing educational philosophies and

conflicting research results among educators and social scientists, the courts have not as yet been able to establish ascertainable standards upon which to render sound decisions. This suggests that educators can save themselves and their districts many legal problems if they adopt a more defensible conduct in the establishment of teacher evaluation policies and practices.

Purpose of the Investigation

The purpose of this investigation was to qualitatively analyze the teacher evaluation policies and procedures currently employed in five Utah school districts and to analogize the flaws and deficiencies identified there-in to determine if they exhibit characteristics which if tested in a court of law could result in adverse court decisions that the districts can ill afford. There are several reasons why this subject was chosen. Specifically, school district policies and procedures established by Boards of Education provide the foundation and set the parameters for administrative decision making. When the policies and procedures are well known, clearly stated, and consistently applied they can significantly reduce the legal costs that ultimately affect the educational opportunities of the children. Furthermore, evaluation policies and procedures are essential because they can provide information which can serve to facilitate the improvement of instruction and professional competence. When the procedures and/or the instruments used are legally flawed they provide the bases for legal battles that can be damaging to the reputation of the educators and the educational endeavor. Although it may not be possible to discourage teachers from using the services of the court system, it is possible to minimize the potential damages that can occur from losing a civil rights case. These losses usually extend beyond time and money because they can involve the reinstatement of incompetent personnel, a significant loss of public confidence in education, and a reduction in the collegiality between the teachers and administrators.

Methodology

To obtain the data needed for the investigation, policy statements and rating forms were obtained from five Utah school districts. These documents were analyzed to identify key areas that reflected the potentiality of causing legal conflicts. Using the technique of analogization the key issues identified were compared with relevant case law to ascertain whether the problems they present could be predicted to result in adverse legal action.

At the present time there are 40 school districts in the state. However, it was decided to limit the population sample and only use five of the largest districts in the State. The districts selected are all located in the North Central part of the state and were chosen for the following reasons: First, their total enrollment represents 58 percent of the total public school enrollment in the state, second, they are located in the urbanized area of the State of Utah, third, they usually demonstrate more progressiveness than the other 33 school districts, fourth, because of their relatively large student population and their currently projected increase in enrollment, they are aggressively seeking ways of improving their productivity and quality of instruction. The policy statements and rating forms were obtained by personal contact with district officials.

To analyze and evaluate the policies and rating instruments a set of eight questions were identified. (see appendix item) These questions were selected

because they represent the key issues that have tended to be the grounds for the majority of the court cases that have been concerned with policy and procedure conflicts arising from teacher evaluations. The questions were designed so as to identify flaws and deficiencies that could be the basis for a legal cause for action.

After the qualitative analysis was completed, the deficiencies identified were analogized to the current case law to predict the seriousness of their nature. The technique employed is known as analogization. This is a legal case analysis method that is commonly employed by the legal profession to predict what the results of litigation might be. The technique is based on a process of comparing the facts in an existing legal opinion with the facts at hand (the client case), and the applicable rule of law established in the opinion with the applicable rule of law in the client case. The process is called analogization because the investigator attempts to determine if the facts and rules of law are sufficiently analogous that the established precedent would apply. In sum, analogization is founded on the legal premise that "like cases should be decided alike."[6] As Statsky and Wernet (1977) observe, the analogization model has some limitations. For example, finding cases that are identical in all respects with the client case,"on all fours," rarely occurs. Judges and juries are not all cast in the same mold and their differing attitudes and perspectives toward the issue may significantly alter the final outcome. Finally, the difference in advocacy skill of the opposing legal counselors may materially change the ultimate result. However, given appropriately analogous facts and rules of law, judges and juries with a customary sense of justice, and equally skilled legal advocates, an experienced user may predict the outcome of a court case with a reasonable degree of confidence.

Data Analysis

Qualitative Analysis (Policies and Procedures)

Analysis of the policies, procedures, and the rating forms received from the five school districts revealed the following:

1. All five districts have written teacher evaluation policies that prescribe the procedures to be followed for evaluating probationary (provisional) teachers. Two of the five have policies that require specific evaluation of non-probationary instructional personnel, and one district has a self-evaluation program in which all of the teachers are involved.

2. Two of the districts have specific contractual agreements with the teachers' association concerning teacher evaluation. The remainder do not.

3. All of the five districts have philosophical statements of the purpose and objectives of their evaluation program. Most clearly identify the purpose to be "improvement of instruction and professional competence."

4. None of the districts either explicitly or implicitly require any form of training for the evaluators. However, one of the districts requires that the principal hold an

orientation session with the teachers at the start of the school year.

5. Two of the districts specify that the teachers will be observed in the classroom. The remainder make no mention of the exact setting in which the evaluation will occur.

6. Four of the districts specify that the principal shall be the evaluator. The remaining district employs the term "administrator."

7. One district requires three formal observations of its provisional teachers, one requires two, and the rest require an annual evaluation of their provisional staff. Two of the districts require that all of the instructional staff be evaluated annually and one district mandates that the non-provisional staff be evaluated formally every three years.

8. Only one of the districts specifically requires that the teachers be informed in advance of the timing of the evaluation. The remainder do not specifically require notification.

Further Qualitative Analysis (The Rating Form)

9. All of the districts provide written evaluation criteria on a formal reporting instrument. However, they vary in some respects in their specific format. Two listed their evaluation criteria in general terms, requiring written comments of the observations made, two use a rating checklist and one uses a self-evaluation instrument.

10. The majority of the evaluation criteria chosen by the districts demonstrate some relationship to the instructional process. They exemplify a broad range of performance areas that can be grouped into five categories. These are:
    a. Instructional strategies/teaching techniques
    b. Classroom management and control
    c. Knowledge of subject matter
    d. Personal and professional qualities
    e. Interaction with students.

11. All of the districts provided the teachers the opportunity to affirm, by signature, that they have read and discussed the evaluation. The majority of the instruments state that the teacher's signature is only an acknowledgment of their review and does not constitute any agreement.

12. Five of the seven districts specifically grant the teachers the right to append any comments, explanations, and/or recommendation to the final evaluation form.

Conclusions Derived From The Qualitative Analysis

Although the majority of the forms demonstrate some legal sufficiency, they also reflect flaws and deficiencies that significantly limit their

validity and reliability which could lead to undesirable conflicts between teachers and the administration. The most apparent of these are:

1. The stated criteria are not clearly tied to the teaching task and responsibilities common to virtually all teachers. Examples of these are:
    a. "Demonstrates a wholesome sense of humor."
    b. "Maintains an professional appearance."
    c. "Maintains health and vitality; Has sufficient energy to accomplish job.
    d. "Maintains good grooming, is neat and appropriately dressed."
    e. "Has good personal habits."
    f. "Has a pleasing, well modulate voice."
    g. "Organizes thoughts well."
    h. "Speaks distinctly and convincingly, communicates well."

    The foregoing reflect three fundamental characteristics that could cause conflicts. First, they rely on terms that are vague and ambiguous. Thus they can be easily misconstrued by both the teachers and the evaluators. Second, the performance criteria do not fully relate to the teaching tasks and responsibilities, because they do not specify what influence is exerted on the actual learning process. Third, the evaluators can only apply those value judgments they believe are consistent with the local value system imposed by the local Board of Education and the public at large. For example, what constitutes good health and vitality might well be interpreted in such a manner that a handicapped person could be dismissed for incompetency; or the interpretation of professional appearance could be based on an unacceptable stereotyping that fails to take in consideration the seasonal climatic conditions that prevail in a given area or other compelling considerations such as subject taught or cultural differences.

    Attempts to assess oral communication ability could overlook the level of instruction being provided or common differences in language usage such as dialect and intonation. Although gross demonstrations of the characteristics illustrated could be disruptive to the learning process, the degree that they are exhibited and their affect on the teaching task is not clearly identified or concisely stated.

2. Even though some performance criteria may demonstrate a valid job relatedness, they are often not defined in terms of observable behaviors or explicit standards by which to judge performance. Examples of these include:

    a. "Maintains balance between freedom and control in the classroom"
    b. "Classroom shows clearly defined limits and expectations"
    c. "Anticipates and avoids disruptive situations"
    d. "Establishes a positive learning environment"
    e. "Encourages student self discipline, growth in self esteem, and good work habits"

f. "Demonstrates leadership"
g. "Uses good judgement in use of books, supplies and materials"
h. "Has interest in the individual child"
i. Terminology used to measure and judge performance such as:"Superior," "Satisfactory," "Unsatisfactory."

These criteria all fail to specify "how" such teacher performance can be described and measured. With an absence of guidelines to indicate the types of performance behaviors to identify and observe, or an absence of examples that are valid indicators of the criterion, the criteria are subject to the vagaries of individual interpretation and judgement.

3. No evidence was found in the policies and procedures of a requirement for, or provision of, formal training for the administrators who are responsible for conducting evaluations. This raises the question as to what degree of reliability is achieved in the process. Is there a consistency in the observation of teachers by multiple evaluators, and is there a consistency in the way different evaluators interpret the evaluation criteria? The answer to these questions is beyond the scope of this study; however, reliability has potential legal ramifications and should not be overlooked.

The flaws and deficiencies identified above represent a combination of the common problems found in the selected teacher evaluation policies and practices. Aggregating these problems allowed the authors to : (1) maintain the anonymity of the participating districts and avoid unwarranted and unwanted entanglement with the legal profession and (2) establish the potential client case situations that served as the basis for analogization with established court decisions.

Limitations of the Study

As stated above the analogization process is used as means of predicting the probable outcome of a court case. It consists of determining what key facts and rules of law are analogous in the situation at hand (client case) and settled court cases. In applying this process to the facts and circumstances identified in this paper, the authors wish to state that some limitations need to be acknowledged at the outset. First it should be observed that the State of Utah has no statute governing teacher evaluation. Thus the districts that have adopted the process have done so at their own discretion and the policies and procedures employed are of their own choosing. Therefore, teacher evaluation only becomes a contentious issue when its use adversely affects individual personnel decisions such as promotion, demotion, contract renewal, and/or dismissal. All of which can constitute a deprivation of a property right.

However, the analysis will be limited to whether the policies and practices are legally defensible and will not address the issues of due process, dismissal, or discrimination in particular. Second, the process that will be followed infra represents a potential rather than any actual situation. Third, because of the hypothetical nature of the investigation and the necessity of maintaining some degree of brevity, a demonstrative rather than an exhaustive

analysis has been used. Fourth, because deprivation cases are usually based on violations or infringement of constitutional or statutory rights, it has been assumed that any conflicts resulting from legal flaws or deficiencies found in the policies, procedures and instruments examined would be tried in the United States District Court for the State of Utah. Finally, for the purpose of this paper the use of the terms test and evaluation follow the Equal Employment Opportunity Commission's (EEOC) definition of the terms.[8]

Analogization of the Major Issues

1. First Major Issue - Job Relatedness:
One of the major issues identified in the analysis of the policies and procedures is that the performance criteria used is not clearly tied to the teaching tasks and responsibilities commonly expected of teachers. In other words, there is a demonstrable lack of job relatedness. Examples of these elements are set forth on page 9 supra.[9]
In Griggs et al. v. Duke Power Company (1970)[9] a minority suspect class alleged that they were being discriminated against because inter alias their employer had imposed a requirement that they pass an intelligence test before they could be promoted to other divisions of the company where they could receive a higher salary. In resolving the conflict in Griggs the United States Supreme Court established a rule of law which prohibits employment practices that are not job related. Chief Justice Burger wrote the opinion in which he said:

> Nothing in the Civil Rights Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.[10]

In Albemarle Paper Co. v. Moody (1975)[11] the fact situation was analogous to Griggs. Justice Stewart writing for the Court observed," [T]he concept of job relatedness takes on meaning from the facts of the Griggs case."[12] Further elaborating on this theme the Court went on to establish exacting standards for rating the performance of of employees.

In Chance v. Board of Examiners (1972),[13] a case more directly connected with education, the major issue addressed was whether the examinations required for appointment to the position of school principal could be "validated as relevant to the requirement of the position of which they are given, i.e., whether they are job related."[14] In Chance[15] the Second Circuit Court of Appeals affirmed the District Court's holding regarding job relatedness when it determined that the criteria used for measuring job qualifications could not be shown to be job related because they lacked content and predictive validity. The Appeals Court also pointed to two accepted methods used to determine whether a particular examination is job relate or reasonably constructed to measure what it purports to measure. One is content validity and the other is predictive validity.[16]

Although there are dissimilarities in the specific facts and circumstances found in the teacher evaluation analysis and those identified in the cases cited supra, the use of measuring devices and evaluation

techniques for predicting or determining the effectiveness of human performance have a decided commonality in that the evaluation criteria used must be related to the job an individual is performing or applying for. Consequently the rule of law established by the U.S. Supreme Court and the Second Court of Appeals can be analogized with this major issue.

2. Second Major Issue - Vague and Ambiguous Terminology

The second major issue identified in the analysis concerns the definition of the indicators used to identify performance behaviors. Some of those listed are not explicitly described nor is there any indication as to how or by what standard the teaching performance should be measured. As noted ante, the absence of concrete examples or positive guidelines can lead to the rating criteria being subject to the vagaries of undesirable interpretations and/or judgements. The specific facts connected with this issue are set forth supra, pages 5 and 6.

In Brito et al. v. The Zia Company (1973) [17] a minority suspect class employed by the Zia Corporation alleged discriminatory employment practices because the company's employee evaluation performance evaluation test was based primarily on subjective observations by the evaluators, two out of three of whom did not observe the workers on a daily basis and did not administer and score such observations under controlled and standardized conditions.[18] The Tenth Circuit Court of Appeals ruled that the EEOC guidelines for evaluating employees were controlling and any testing method or procedure used for hiring, promotion or dismissal had to be in compliance with the published criteria. Specifically, the court applied the following EEOC guidelines (29 CFR §1607.5):

Minimum standards for validation

(a) For the purpose of satisfying the requirements of this part, empirical evidence in support of a test's validity must be based on studies employing generally accepted procedures for determining criterion related validity, . . .

(b) Although any appropriate validation strategy may be used to develop such empirical evidence, the following minimum standards, as applicable, must be met in the research approach and in the presentation of results which constitute evidence of validity:

(1) Where a validity study is conducted in which tests are administered to applicants, with criterion data collected later, the sample of subjects must be representative of the normal or typical candidate group for the job or jobs in question.

(2) Tests must be administered and scored under controlled and standardized conditions, with proper safeguards to protect the security of test scores and to insure that scores do not enter into any judgements of employee adequacy that are to be used as criterion measures.

(3) The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques, the appraisal form(s) and instructions to the raters must be included as part of the validation evidence.

(4) In view of the possibility of bias inherent in subjective evaluations, supervisors' prejudice, as, when, as new carefully developed, and the ratings should be closely examined for evidence of bias.[19]

In a similar civil rights action arising from alleged racially discriminatory practices in promotion and transfer, Rowe et al. v. General Motors Corporation, (1972),[19] the court ruled that the promotion/transfer procedures as applied, violated Title VII, specifically where written instructions were lacking and where standards determined to be controlling were vague and subjective.

In Albemarle the United States Supreme Court considered subjective supervisory ratings of employees as one of the key facts. Because Albemarle's supervisors were asked to rank employees by "standards" that were "extremely vague and fatally open to divergent interpretation," there was no way of knowing precisely (1) what criteria of job performance were being considered; (2) whether each supervisor was considering the same criteria or, (3) whether any of the supervisors actually applied a stable body of criteria.[20] In this particular case, the court cited the rule of law established in Griggs as controlling.[21]

Although there are some fundamental differences in the facts and circumstances in the cases cited, the issues are analogous in that vague and subjective evaluations were applied. The similarity of key facts between the cases cited above and the situation at hand lies in the deprivation of property rights resulting from the use of vague and ambiguous criteria for measuring and subsequently judging employee performance.

Conclusions

1. An extensive search of the legal literature corroborated Zirkel's observation that there is a paucity of on point litigation in the area of teacher evaluation. Therefore, to develop the analogs, the authors had to rely on the law established from analogous conflicts arising in other professions.

2. In Griggs, the United States Supreme Court held that any employment practices demonstrating a lack of job relatedness were prohibitive.[22] In the Albemarle decision the High Court affirmed its previous holding and in Chance the Court of Appeals decision was based on the rationale that to be job related the evaluation criteria had to demonstrate both content and predictive validity.[23] Because many of the rating criteria set forth in the evaluation instruments examined are not tied to the teaching tasks and responsibilities, they do not meet the tests the courts have established. Therefore, they represent a basis for conflict that the school districts can ill afford.

3. In Zia, the Tenth Circuit Court of Appeals found that the criteria used to measure employee performance were not fully described and supervisory

ratings were subjectively biased.[24] Similarly in Rowe,[25] standards employed to determine employee adequacy were vague and subjective. In further support, of this holding, the findings in the Albemarle case point out the potential for divergent interpretations resulting from the use of vague standards of performance.[26] Because the fact situations are reasonably analogous to the issue addressed and the rule of law established by the courts is applicable, we suggest that any criteria that are not clearly and explicitly defined in terms of observable performance behaviors or do not rely on established standards that provide for consistent application could lead to adverse litigation for school districts.

4. The absence of a requirement for formal training of individuals responsible for conducting evaluations does not appear to have been explicitly addressed by the the courts. Therefore, the authors were unable to analogize this problem area to any existing case law. However, it has been implied in some of the cases cited when mention was made of the inherent potential for individual bias and subjectivity in the interpretation of criteria. Whether there is a consistency in the observations of teachers among different evaluators or whether there is a consistency in the way different evaluators interpret the evaluation criteria could not be ascertained, with any certainty. However, the issue of evaluation reliability has potential legal ramifications and should not be overlooked. A formal training process for evaluators would increase the likelihood of standardized observations and in doing so, could increase the objectivity among evaluators.

5. In theory, the authors view the application of analogization as a viable technique for school districts to use in ascertaining the legal sufficiency of their policies and procedures. It could be applied to all areas of educational practice where legal entanglement can ensue. Furthermore, it affords the school district, or more specifically the individual decision maker, greater control over problem situations because it is a proactive rather than crisis-oriented approach. Thus its use can increase administrators' awareness of flaws or weaknesses in existing policies and procedures. This could enhance the development of more legally sound practices initiated by educators instead of mandated requirements established by the courts. The potential for reducing court action resulting from ignorance of such flaws and weaknesses could substantially increase a school district's credibility with teachers, boards of education, and the public at large.

6. Although important positive implications are espoused above, implementation of such a process requires further investigation and development, particularly as to how it can best be taught to the already overburdened administrator. Nevertheless, the fact that its applicability and benefits have been demonstrated, the use of the analogization process as a tool in educational practice should not be overlooked or underestimated.

7. We make no claim that an investigation of the policies and procedures employed by five school districts in one state can be generalized across the nation. However, as stated earlier, there is a lack of common agreement as to what constitutes effective teaching. Consequently, teacher evaluation is imperfect at best. But this should not be used as an excuse for ineptly constructed and inappropriately applied policies and procedures which can lead to teacher administrator disputes that can jeopardize school districts in a court of law.

Appendix

1. Is there a written policy governing teacher evaluation procedures?

2. Is there a expression of the purpose the evaluation policy is designed to fulfill?

3. Does the evaluation policy prescribe the following:
   a. who has the responsibility for conducting teacher evaluations
   b. who is to be evaluated
   c. the setting in which the evaluation will occur
   d. advance notice of:
      1. what criteria will be used in the evaluation
      2. standards constituting acceptable performance
      3. scheduled date of the evaluation
      4. length of the observation period
   e. number of occasions the teacher will be evaluated
   f. procedures for providing timely notice and discussion of evaluation results with the teacher
   g. procedures for providing the teacher an opportunity for remediation.

4. Are the evaluation criteria identified in writing on a formal document?

5. Are the performance criteria job related?
   a. demonstrate a relationship to competencies required to fulfill the purpose of instruction
   b. related to the teaching tasks and responsibilities common to virtually all teachers
   c. provide a representative sampling of performance behaviors

6. Are criteria clearly and explicitly defined?
   a. in terms of observable behaviors that can be reported
   b. in terms of identifiable indicators that specify how the performance criterion will be measured
   c. defined standards of performance so comparisons can be made to individual performance
   d. a requirement for descriptive evidence to establish in what way the teacher has met, failed to meet, or exceeded performance standards.

7. Have evaluation instruments and/or procedures been standardized?
   a. training required for evaluators in use of instruments and procedures
   b. clear and concise instructions to evaluators.

8. When problems exist, does the formal reporting document require:
   a. a description of what has happened
   b. why the behavior is objectionable and/or what rule it breaks in relation to the instructional process
   c. what specifically the teacher is required to do for correction or improvement
   d. amount of time allowed to correct deficiencies

e. consequences if the deficiency is not corrected and /or if further incidents occur
f. documentation that both the teacher and evaluator have discussed the results of the evaluation.

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8. 29 CFR 1607 et seq.

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10. Id. at 436.

11. Albemarle Paper Company v. Moody, 422 U.S.405 (1975).

12. 422 U.S. at 426.

13. Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972).

14. Id. at 1174.

15. Chance v. Board of Examiners, 330 F.Supp. 203 (S.D.N.Y. 1971).

16. 458 F2d at 1174.

17. Brito et al. v. Zia Company, 478 F.2d 1200 (10th Cir. 1973).

18. Extracted from 478 F.2d at 1202, nn. 2.

19. Rowe et al. v. General Motors Corporation,457 F.2d 348 (5th Cir. 1972).

20. 422 U.S. 433.

21. Id. at 436.

22. 401 U.S. 424.

23. 458 F.2d at 1175.

24. 478 F.2d 1200.

25. 457 F.2d at 358.

26. 422 U.S. at 405.